(3)

Supreme Court, U.S.
FILED
NOV 1 1996
CLERK

No. 96-545

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

DAVID L. SMITH,

Petitioner,

v.

REGIONAL TRANSPORTATION DISTRICT, RICHARD BAUMAN, ROBERT GARSIDE, RICHARD REYNOLDS, ELLSWORTH WALKER, JAMES MISEK,

Respondents.

REPLY BRIEF TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

DAVID L. SMITH

1630 Welton Street, Suite 300
Denver, Colorado 80202
(303) 534-0153

PRO SE ATTORNEY-PETITIONER

35 pp

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

REPLY BRIEF TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI 1

SUPPLEMENTAL APPENDIX . . . . . Attached

TABLE OF AUTHORITIES

CASES

Burkett v. Chandler, 505 F.2d 217 (10th Cir. 1974), cert. denied, 423 U.S. 876, 96 S.Ct. 149, 46 L.Ed.2d 110 (1975) 6

Crumpacker v. Indiana Supreme Court Disciplinary Commission, 470 U.S. 1074 (1985) 10

Talamini v. Allstate Insurance Co., 470 U.S. 1067 (1985) 10

STATUTES

28 U.S.C. § 372(c) 7

28 U.S.C. § 455(a) 6, 8

28 U.S.C. § 1291 6

28 U.S.C. § 1292(a)(1) 6, 8

28 U.S.C. § 1651(a) 8

42 U.S.C. § 1981 2

42 U.S.C. § 1983 2

42 U.S.C. § 1985(3) 2

42 U.S.C. § 1986 2

OTHER AUTHORITIES

Amend. 1, U.S. Consti. 4, 5, 10

Amend. 5, U.S. Consti. 8

Amend. 7, U.S. Consti. 4

Sup. Ct. R. 8 9

Sup. Ct. R. 15.3. 9

Fed. R. App. P. 21 8

Fed. R. Civ. P. 56 4

D.C.COLO.LR 83.6P. 3, 4, 5

No. 96-545

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

DAVID L. SMITH,

Petitioner,

v.

REGIONAL TRANSPORTATION DISTRICT, RICHARD BAUMAN, ROBERT GARSIDE, RICHARD REYNOLDS, ELLSWORTH WALKER, JAMES MISEK,

Respondents.

REPLY BRIEF TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

On or about October 23, 1996, the attorney for respondent Regional Transportation District, Rolf G. Asphaug, filed his brief in opposition to petition for a writ of certiorari, asserting that "Smith's failure to supply this Court with the orders in question, or even a semblance of an argument as to why or how the orders were in any way improper, is a compelling reason to deny the petition." However, Mr. Smith supplied this Court with the following orders: (1) Order issued by the United States Court of Appeals for the Tenth Circuit on November 29, 1993 suspending Mr. Smith from the practice of law in the Tenth Circuit until he pays more than $50,000.00 in harsh and unjustified sanctions imposed against him by the Tenth Circuit and by the United States District Court for the District of Colorado; (2) Order issued by

the Tenth Circuit on February 13, 1996 disbarring Mr. Smith from the practice of law in the Tenth Circuit based on his alleged violation of its (November 29, 1993) suspension order; (3) Order issued by the Tenth Circuit on February 16, 1996 affirming the order issued by the United States District Court for the District of Colorado on February 10, 1995 imposing "simultaneous and identical" discipline against Mr. Smith as that imposed against him by the Tenth Circuit in its (November 29, 1993) suspension order; (4) Order and judgment issued by the Tenth Circuit on July 23, 1996 affirming the orders issued by United States District Judge Zita L. Weinshienk imposing immediately payable attorney fees and costs of approximately $9,500.00, and other harsh and unjustified sanctions, against Mr. Smith; and, (5) Order issued by the Tenth Circuit on August 29, 1996 denying Mr. Smith's petition for rehearing and suggestion for rehearing en banc of its (July 23, 1996) order and judgment. (See Appendix to Petition for a Writ of Certiorari, at pages A-1 through A-14, and A-23 through A-24.)

Mr. Smith summarized Judge Weinshienk's other orders as follows: (1) Judge Weinshienk's (December 10, 1992) order which severely attacked, reprimanded and warned Mr. Smith for seeking dismissal with prejudice of Mr. Qualls' remaining Title VII claim so that an appeal of his improperly dismissed claims under 42 U.S.C. §§ 1981, 1983, 1985(3) and 1986 could be taken to the United States Court of Appeals for the Tenth Circuit, and which was issued without giving Mr. Smith prior notice that attorney sanctions were being considered, and without giving him the opportunity to file a brief or otherwise respond to Judge Weinshienk's unsubstantiated attacks on his professional

character, judgment and reputation; (2) Judge Weinshienk's (February 2, 1995) order denying Mr. Smith's motion to continue her (September 21, 1994) disciplinary order, including the provision of the order staying the Committee on Conduct's (December 8, 1993) suspension of Mr. Smith from the practice of law in the District Court, nunc pro tunc to November 29, 1993; (3) Judge Weinshienk's (February 10, 1995) disciplinary order imposing "identical" discipline against Mr. Smith as that imposed against him by the Tenth Circuit disciplinary panel in its (November 29, 1993) disciplinary order, and suspending him from the practice of law in the District Court pursuant to D.C.COLO.LR 83.6P.; (4) Judge Weinshienk's (May 15, 1995) orders which removed Mr. Smith as Mr. Qualls' attorney and lifted the stay in Mr. Qualls' civil rights case, and which were issued without prior notice of the contemplated removal of Mr. Smith as Mr. Qualls' attorney and without an opportunity for them to file a brief; (5) Judge Weinshienk's (July 31, 1995) order denying Mr. Qualls' and Mr. Smith's motion for reconsideration of Magistrate Judge Abram's (January 28, 1994) order imposing harsh and unjustified sanctions of $8,187.50 against Mr. Smith for filing alleged "frivolous" discovery motions, and requiring him to pay this amount to Defendant-Appellee Regional Transportation District by no later than February 28, 1994; (6) Judge Weinshienk's (August 10, 1995) order granting Defendants' Motion for Attorney Fees, determining that the reasonable amount of attorney fees for filing the interlocutory appeal in Qualls was $1,187.50, and ordering Mr. Smith to pay this amount to Defendants-Appellees pursuant to the Tenth Circuit disciplinary panel's (July 18, 1995) order. (See Appendix to Petition for a Writ of Certiorari, at pages

A-16 through A-18.)

Finally, Mr. Smith advised this Court that he raised and briefed the following issues on appeal: (1) Whether Judge Weinshienk's arbitrary, discriminatory and otherwise improper application of the Rule 56 summary judgment procedure and standard deprived Mr. Qualls of his First Amendment right to petition the government for a redress of grievances, as well as his Seventh Amendment right to a jury trial; (2) Whether Judge Weinshienk issued her (December 10, 1992) order without giving Mr. Smith prior notice that attorney sanctions were being considered, and without giving him the opportunity to file a brief or otherwise respond to her unsubstantiated attacks on his professional character, judgment and reputation; (3) Whether by participating (as a member of the recomposed District Court disciplinary panel) in the (February 2, 1995) decision to deny Mr. Smith's motion to continue the District Court disciplinary panel's (September 21, 1994) disciplinary order, including the provision of the order staying the Committee on Conduct's (December 8, 1993) suspension of Mr. Smith from the practice of law in the District Court, nunc pro tunc to November 29, 1993, and in the decision to issue the (February 10, 1995) disciplinary order imposing "identical" discipline against Mr. Smith as that imposed by the Tenth Circuit disciplinary panel in its (November 29, 1993) disciplinary order, and suspending Mr. Smith from the practice of law in the District Court pursuant to D.C.COLO.LR 83.6P., Judge Weinshienk gave effect to a local rule which is unconstitutional on its face, and as applied to Mr. Smith in the District Court disciplinary action, and to Mr. Smith and his clients in pending and potential civil rights litigation, including

Qualls; (4) Whether Judge Weinshienk gave effect to this unconstitutional local rule even though the procedure followed by the Tenth Circuit disciplinary panel was so lacking in notice or opportunity to be heard that it denied due process to Mr. Smith; even though imposition by the recomposed District Court disciplinary panel of the same discipline as that imposed by the Tenth Circuit disciplinary panel has resulted in grave injustice to Mr. Smith; even though the kind of misconduct (if any) established against Mr. Smith has been held by the District Court to warrant substantially less discipline; and even though Mr. Smith's attorney, Mr. Figa, has refused to represent him competently in connection with the Tenth Circuit and District Court disciplinary actions; (5) Whether by issuing her (May 15, 1995) orders in Qualls removing Mr. Smith as Mr. Qualls' attorney and lifting the stay in his civil rights case, Judge Weinshienk acted beyond the scope of the recomposed District Court disciplinary panel's (February 10, 1995) disciplinary order, which did not permit removal of Mr. Smith as attorney for his clients in pending civil rights litigation; (6) Whether such permission would constitute an impermissible ex post facto or retroactive application of D.C.COLO.LR 83.6P.; would impermissibly interfere with Mr. Smith's right to represent his clients in accordance with the terms of their contingent fee agreements; and would impermissibly interfere with Mr. Smith's clients' First Amendment rights to pursue federal civil rights litigation; (7) Whether this was especially true for Mr. Qualls, who was financially unable to hire substitute counsel, and was incompetent to proceed pro se against experienced defense counsel; (8) Whether even if the District Court disciplinary panel's (February 10,

1995) disciplinary order permitted Judge Weinshienk to remove Mr. Smith as attorney for his clients in pending federal civil rights litigation, this could not be done without affording procedural due process of law; (9) Whether Mr. Qualls and Mr. Smith were denied procedural due process of law by Judge Weinshienk's refusal to allow Mr. Smith to argue on their behalf before issuing her (May 15, 1995) orders, which were issued without prior notice of the contemplated removal of Mr. Smith as Mr. Qualls' attorney and without an opportunity to file a brief; (10) Whether Judge Weinshienk grossly abused her discretion or otherwise acted improperly or in a manner detrimental to the fair and impartial administration of justice by issuing her (June 16, 1995) order refusing to disqualify herself from the case pursuant to 28 U.S.C. § 455(a); (11) Whether by rubber-stamping Magistrate Judge Abram's sanction order, Judge Weinshienk again grossly abused her discretion or otherwise acted improperly or in a manner detrimental to the fair and impartial administration of justice; (12) Whether Mr. Qualls and Mr. Smith were entitled to an immediate appeal or writ of mandamus or prohibition under the exception to the final judgment rule established by the Tenth Circuit in Burkett v. Chandler, 505 F.2d 217 (10th Cir. 1974), cert. denied, 423 U.S. 876, 96 S.Ct. 149, 46 L.Ed.2d 110 (1975); (13) Whether Judge Weinshienk's orders were also appealable under the "plain language" of 28 U.S.C. § 1292(a)(1), which permits immediate appeals of rulings relating to injunctions, including stays; (14) Whether Judge Weinshienk's orders were appealable under 28 U.S.C. § 1291; (15) Whether the contradiction between the (September 29, 1995) Stipulation of Dismissal With Prejudice and the (September

29, 1995) Settlement Agreement and Full and Final Release evidenced a fraud on Mr. Smith and/or the Court; (16) Whether Judge Weinshienk's (October 10, 1995) Order of Dismissal is null and void; (17) Whether by returning Mr. Smith's motions to him on the alleged basis that "Mr. Smith was never made a party to this case by the Court," Judge Weinshienk grossly abused her discretion or otherwise acted improperly or in a manner detrimental to the fair and impartial administration of justice; (18) Whether Judge Weinshienk also engaged in judicial misconduct pursuant to 28 U.S.C. § 372(c). (See Petition for a Writ of Certiorari, at pages 5-10; see also Appendix to Petition for a Writ of Certiorari, at pages A-18 through A-20.)

Under these circumstances, Mr. Smith has supplied this Court with the "orders in question," and has made an argument for "how and why the orders are improper." Mr. Asphaug, on the other hand, has failed to supply this Court with any documentation, much less any orders, to support his "very limited, selective summary of the tortuous proceedings in this matter," or to support his entirely unsubstantiated (and therefore frivolous) arguments that (1) the lower courts' orders were not abuses of discretion; (2) the Tenth Circuit was not obligated to disqualify itself; and, (3) this Court's supervisory power is not required.

Contrary to Mr. Asphaug's assertions, the Tenth Circuit's previous orders and judgments imposing harsh and unjustified sanctions and discipline against Mr. Smith are not his only basis for arguing that the Tenth Circuit's fairness and impartiality might reasonably be questioned, and that the Tenth Circuit was therefore obligated to

disqualify itself from the case pursuant to 28 U.S.C. § 455(a). Mr. Smith also bases his argument on the Tenth Circuit's refusal to provide a statement of reasons, addressing the issues raised and briefed on appeal, for its order and judgment affirming the orders issued by Judge Weinshienk imposing immediately payable attorney fees and costs of approximately $9,500.00, and other harsh and unjustified sanctions, against Mr. Smith. By failing or refusing to disqualify itself from the case under these circumstances, the Tenth Circuit again deprived Mr. Smith of his liberty and property interests in his good name, reputation, honor and integrity, and in his right to practice law and make a living, in violation of his Fifth Amendment right to due process of law. The Tenth Circuit also so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such procedure by Judge Weinshienk, as to call for the exercise of the Supreme Court's power of supervision.

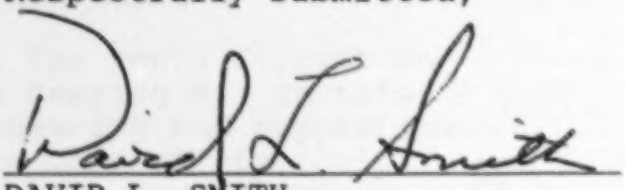
Attached hereto as part of a supplemental appendix is the opinion issued by the Tenth Circuit on July 23, 1996 dismissing for lack of jurisdiction the appeal of the orders issued by Judge Weinshienk in Howard v. Mail-Well Envelope Company, et al., imposing immediately payable attorney fees and costs of approximately $9,000.00, and other harsh and unjustified sanctions, against Mr. Smith in that case, even though the Tenth Circuit had the authority to hear and decide the appeal pursuant to 28 U.S.C. §§ 1291(a)(1) and 1651(a), and Fed. R. App. P. 21. This opinion, which is pending before this Court on Mr. Smith's petition for a writ of certiorari, is further graphic evidence of the Tenth Circuit's bias against Mr. Smith, and of the need for the exercise

of this Court's power of supervision.

Mr. Asphaug has joined a request for award of just damages and double costs with his brief in opposition to petition for a writ of certiorari, in blatant violation of Sup. Ct. R. 15.3. This is not the first time that Mr. Asphaug, in his eagerness to provoke this Court into imposing harsh and unjustified sanctions and discipline against Mr. Smith, has violated Sup. Ct. R. 15.3. On or about February 15, 1995, Mr. Asphaug joined a similar request for award of just damages and double costs with his brief in opposition to a previous petition for a writ of certiorari filed by Mr. Smith in this case. Although Mr. Asphaug's request was in violation of Sup. Ct. R. 15.3., and although Mr. Smith was not served with a copy of Mr. Asphaug's subsequent separate motion for award of just damages and double costs, this Court granted Mr. Asphaug's request and motion at the same time it denied Mr. Smith's petition for a writ of certiorari, imposed sanctions of $500.00 against Mr. Smith for filing what Mr. Asphaug claimed was a "frivolous" petition for a writ of certiorari, and ordered Mr. Smith to pay this amount to Mr. Asphaug within 21 days. When Mr. Smith failed to pay Mr. Asphaug as ordered by this Court, he was disbarred from practice in this Court without being afforded the hearing required by Sup. Ct. R. 8, even though material facts were in dispute on the defenses raised by Mr. Smith in his verified response to the order to show cause issued by the Clerk of this Court. Mr. Smith's petition for rehearing and motion to recall and amend judgment were also denied. Mr. Smith is now being prosecuted by the Supreme Court of Colorado on reciprocal discipline charges based on this Court's order of disbarment.

Neither of Mr. Smith's petitions for a writ of certiorari are "frivolous," as charged by Mr. Asphaug. Both petitions are warranted by existing law or by an argument for the extension, modification or reversal of existing law, or the establishment of new law. Both petitions are based on the existence of an adequate factual foundation. Under these circumstances, imposition of harsh and unjustified sanctions and discipline against Mr. Smith for exercising his First Amendment right to petition this Court for a redress of grievances is unwarranted. See Talamini v. Allstate Insurance Co., 470 U.S. 1067 (1985); Crumpacker v. Indiana Supreme Court Disciplinary Commission, 470 U.S. 1074 (1985). Furthermore, since no other litigants or their attorneys have been punished in this manner, imposition of such sanctions and discipline against Mr. Smith is detrimental to the fair and impartial administration of justice.

Respectfully submitted,



DAVID L. SMITH

1630 Welton Street, Suite 300
Denver, Colorado 80202
(303) 534-0153

PRO SE ATTORNEY-PETITIONER

SUPPLEMENTAL APPENDIX

Opinion issued by the Tenth Circuit on July 23, 1996 dismissing for lack of jurisdiction the appeal of the orders issued by Judge Weinshienk in Howard v. Mail-Well Envelope Company, et al., imposing immediately payable attorney fees and costs of approximately $9,000.00, and other harsh and unjustified sanctions, against Mr. Smith in that case, even though the Tenth Circuit had the authority to hear and decide the appeal pursuant to 28 U.S.C. §§ 1291(a)(1) and 1651(a), and Fed. R. App. P. 21 . . . . . SA-1

Mr. Smith's petition for rehearing and suggestion for rehearing en banc (filed on August 5, 1996) of the Tenth Circuit's (July 23, 1996) order and judgment in Howard v. Mail-Well Envelope Company, et al. SA-12

Order issued by the Tenth Circuit on August 29, 1996 denying Mr. Smith's petition for rehearing and suggestion for rehearing en banc of its (July 23, 1996) opinion in Howard v. Mail-Well Envelope Company, et al. . SA-18

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

	)	[July 23, 1996]
LINDA C. HOWARD,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. 95-1428
	)	
MAIL-WELL ENVELOPE COMPANY, BUTLER PAPER COMPANY, GEORGIA-PACIFIC CORPORATION GREAT NORTHERN NEKOOSA CORPORATION EMPLOYEE PROTECTION PLAN,	)	
	)	
Defendants-Appellees,	)	
	)	
---	)	
	)	
DAVID L. SMITH,	)	
	)	
Attorney-Appellant.	)	
	)	

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLORADO
(D.C. No. 93-D-1895)

Submitted on the briefs:[1]

Linda C. Howard, pro se for Plaintiff-Appellant and David L. Smith, pro se, Denver, Colorado, for Attorney-Appellant.

Jeffrey T. Johnson, Brian M. Mumaugh of Holland & Hart, Denver, Colorado, for Defendants-Appellees Mail-Well Envelope Company, Butler Paper Company, and Georgia-Pacific Corporation and Attorneys for Defendant-Appellee Great Northern Nekoosa Employee Protection Plan; Randall A. Constantine and Amy L. Lloyd of Elrod and Thompson, Atlanta, Georgia, for Defendant-Appellee Great Northern Nekoosa Corporation Employee Protection Plan.

Before ANDERSON, BRORBY AND HENRY, Circuit Judges

BRORBY, Circuit Judge.

Attorney David L. Smith brings this interlocutory appeal challenging the district court's order awarding appellees $8,640.00 in sanctions. For the reasons stated, we dismiss for lack of jurisdiction.

---

[1]After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

I

This case is but the latest chapter of the continuing saga of attorney David L. Smith. In 1993, we issued an order to show cause why Mr. Smith should not be fined, disbarred, or otherwise disciplined for filing frivolous appeals. In re Smith, 10 F.3d 723, 724 (10th Cir. 1993)(per curiam), cert. denied, 115 S.Ct. 53 (1994). During oral argument on the order to show cause, Mr. Smith admitted he had not paid any of the sanctions previously imposed on him by this court and by the district court. Id. We therefore suspended him from the practice of law before the Tenth Circuit until and unless he demonstrated he had paid all of the sanctions levied against him. Id. In December 1995, we issued a second order to show cause why Mr. Smith should not be disbarred for violating this court's 1993 suspension order by drafting briefs on behalf of allegedly pro se appellants in at least four cases: Qualls v. Regional Transportation Dist., No. 94-1127; Dunkin v. Louisiana-Pacific Corp., No. 94-1130; Howard v. Mail-Well Envelope Co., No. 94-1317; and Seales v. Jefferson County Sch. Dist. R-1, No. 95-1198. In re Smith, 76 F.3d 335 (10th Cir. 1996)(per curiam). Mr. Smith admitted he had written and submitted the briefs in question. Id. at 336. We therefore ordered Mr. Smith's name be stricken from the list of attorneys allowed to practice before the Tenth Circuit. Id. The United States Supreme Court has also disbarred Mr. Smith. In re Disbarment of David L. Smith, ____ U.S. ____, 116 S.Ct. 510 (1995).

After we initially suspended Mr. Smith from practicing before this court in 1993, see In re Smith, 10 F.3d 723, the Committee on Conduct of the United States District Court for the District of Colorado took up the question of whether Mr. Smith should also be suspended from practicing before that court. Pending final action by the Committee on Conduct, the district court stayed all proceedings in this case. See Howard v. Mail-Well Envelope Co. 164 F.R.D. 524, 525 (D. Colo. 1996). Both Ms. Howard and Mr. Smith appealed the stay order, but we dismissed their appeal for lack of jurisdiction. Howard v. Mail-Well Envelope Co., No. 94-1317 (10th Cir. Nov. 15, 1994); see Howard, 164 F.R.D. at 525. In our order, we referred appellees' motion for sanctions on appeal to a Tenth Circuit disciplinary panel. Id. The disciplinary panel granted appellees' motion, awarded double costs and attorney fees, and remanded the case to the district court to determine the amount of attorney fees to be awarded. Howard v. Mail-Well Envelope Co., No. 94-1317 (10th Cir. July 18, 1995). By an order dated September 7, 1995, the district court concluded $8,640.00 in attorney fees should be awarded to the appellees, to be paid exclusively by Mr. Smith. The district court also advised Ms. Howard that Mr. Smith had been suspended from practicing law before the United States District Court for the District of Colorado, see In re Smith, No. 95-1119, 1996 WL 67191 (10th Cir. Feb. 16, 1996) (affirming district court disciplinary panel's suspension order); Howard, 164 F.R.D. at 525 (noting Mr. Smith's disciplinary status has been resolved and that he is no longer authorized to practice in the United States District Court for the District of Colorado); that

the district court would no longer accept documents signed by Mr. Smith; that she should seek new counsel; and that until she hired an attorney she would be considered to be a pro se litigant.

Both Mr. Smith and Ms. Howard appealed the September 7, 1995 order asserting a litany of errors. A jurisdictional panel of this court dismissed Ms. Howard's claims, leaving Mr. Smith as the sole appellant. Howard v. Mail-Well Envelope Co., No. 95-1428 (10th Cir. Feb. 26, 1996). The jurisdictional panel also dismissed Mr. Smith's challenge to the district court's decision to terminate his representation of Ms. Howard and to no longer accept filings signed by Mr. Smith. Id.; see Richardson-Merrell, Inc. v. Koller, 472 U.S. 424 (1985)(order disqualifying counsel in a civil case is not immediately appealable); United States v. Dickstein, 971 F.2d 446 (10th Cir. 1992)(revocation of permission to appear pro hac vice in a criminal case is not immediately appealable). In addition, to the extent Mr. Smith challenges the propriety of the Tenth Circuit disciplinary panel's award of double costs and attorney fees as sanctions for filing a frivolous appeal, see Howard v. Mail-Well Envelope Co., No. 94-1317 (10th Cir. July 18, 1995), we are without power to grant relief. See In re Smith, 10 F.3d at 724 (a three-judge panel cannot overrule the prior decision of another three-judge panel of this court). Accordingly, the only issue properly before this panel is whether the district court's calculation of the appropriate dollar amount of sanctions in the September 7, 1995, order amounted to reversible error.

II

As a threshold matter, we must determine whether we have jurisdiction over this appeal in light of the fact that Ms. Howard's case is still pending in district court. In G.J.B. & Associates, Inc. v. Singleton, 913 F.2d 824, 827 (10th Cir. 1990), we "join[ed] the majority of circuit courts that have addressed the issue and [held] that a sanction order against an attorney currently of record is not a final decision for purposes of a § 1291 appeal where the underlying controversy remains unresolved." We also held such an order is not appealable under the collateral-order doctrine of Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949), G.J.B. & Assoc., 913 F.2d at 827-29, which the Supreme Court has recently explained "is best understood not as an exception to the 'final decision' rule laid down by Congress in § 1291, but as a 'practical construction' of it." Digital Equip. Corp. v. Desktop Direct, Inc., ____ U.S. ____, ____, 114 S.Ct. 1992, 1995 (1994)(citations omitted); Stubblefield v. Windsor Capital Group, 74 F.3d 990, 997 (10th Cir. 1996). The crux of our decision regarding the collateral-order doctrine was that the attorney may challenge the sanction order as part of an appeal from the final judgment, even if the parties settle or decline to appeal, and therefore it is not effectively unreviewable absent an interlocutory appeal. See G.J.B. & Assocs., 913 F.2d at 829 ("We reject any notion that an attorney risks losing the right to appeal if the parties settle or elect not to appeal from the final judgment"); see also Uselton v. Commercial Lovelace Motor Freight, Inc., 9 F.3d 849, 854 (10th Cir. 1993) (attorneys have standing to appeal orders issued

directly against them, but lack standing to appeal orders applicable only to their clients). Similarly, in Dickstein, 971 F.2d 448, we held an order revoking defense attorney Jeffrey A. Dickstein's permission to appear pro hac vice due to improper conduct was not immediately appealable, because it did not amount to a "final decision[] of the district court[]" within the meaning of 28 U.S.C. § 1291. Id. at 448. Further, as in G.J.B. & Associates, we held the challenged order was not appealable under the collateral-order doctrine because it was not effectively unreviewable through an appeal from a final judgment in the underlying case. Id. at 451. We explained that the only right defense counsel sought to vindicate in his interlocutory appeal was his reputation, which could be just as effectively rehabilitated through an appeal from a final judgment as through an interlocutory appeal, and that he did not seek to vindicate his asserted interest in continuing to represent the defendant throughout the remainder of the proceedings in the district court. Id. Most recently, in Johnson v. Board of County Comm'rs, 85 F.3d 489 (10th Cir. 1996), we exercised jurisdiction over an appeal from an order disqualifying the attorney-appellant from representing one of the parties, even though the underlying controversy had been dismissed with prejudice pursuant to a settlement agreement. We explained our cases "establish that settlement of an underlying case does not preclude appellate review of an order disqualifying an attorney from further representation insofar as that order rests on grounds that could harm his or her professional reputation.

We have no difficulty concluding the order challenged in this case does not amount to a "final decision[] of the district[] court" within the meaning of 28 U.S.C. § 1291. See Stubblefield, 74 F.3d at 995-96 (a "final decision of the district court . . . 'ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment'")(quoting Digital Equip., ____ U.S. ____, 114 S.Ct. at 1995 (citation and internal quotation marks omitted)). Furthermore, in light of our decisions in G.J.B. & Associates, Dickstein, and Johnson, we also conclude we lack jurisdiction over Mr. Smith's interlocutory challenge to the district court's decision under the collateral-order doctrine for three reasons: First and foremost, we see no meaningful distinction between Mr. Smith's position and that of Mr. Dickstein. As in Dickstein, Mr. Smith no longer represents a party in the litigation, but faces the stigma of a ruling that reflects negatively on his competence and conduct. However, as was also the case in Dickstein, the decision Mr. Smith now challenges may be effectively reviewed in an appeal from a final judgment, even if the parties settle their dispute or otherwise elect not to appeal.

Second, we disagree with the rationales underlying the decisions of the Third, Fifth and Seventh Circuits holding a sanction order against an attorney who no longer represents a party in the litigation is appealable under the collateral-order doctrine. See Markwell v. County of Bexar, 878 F.2d 899 (5th Cir. 1989); Eavenson, Auchmuty & Greenwald v. Holtzman, 775 F.2d 535, 537-39 (3d Cir. 1985); Knorr Brake Corp. v. Harbil, Inc., 738 F.2d 223, 225-26

(7th Cir. 1984). The central thesis of these decisions is that attorneys who no longer represent parties in a case may be unable to challenge a sanction order by filing an appeal after a final judgment is entered for two reasons: first, their former clients might settle or elect not to appeal; and second, the attorney might not be notified that a final judgment has been entered given that he no longer actively participates in the litigation. Regarding the first rationale, our decisions in G.J.B. & Associates, Dickstein and Johnson make it clear an attorney may appeal a sanction or disqualification order even if his former client settles or does not appeal. Regarding the second rationale, we believe our sister circuits' analyses improperly blur the line between the impossibility of effective review necessary under the Cohen doctrine and mere inconvenience of monitoring the former client's case and performing the other tasks necessary to perfect an appeal.

Third, our cases make it clear the mere fact the sanction order in this case is currently due in full does not give rise to the type of irreparable harm justifying review under the collateral-order doctrine. In declining to adopt a blanket rule that all sanctions are immediately appealable under Cohen, this court has held, in a unanimous en banc decision, that "[a]ttorneys and parties [must] be fully aware that they must bear the burden of sanctions to the conclusion of the case and appeal on the merits of the fully adjudicated case." D&H Marketers, Inc. v. Freedom Oil & Gas, Inc., 744 F.2d 1443, 1446 (10th Cir. 1984)(en banc). We see no reason to create an exception to this general rule

and allow attorneys who no longer represent a party in the underlying case an immediate opportunity to relieve themselves of the consequences of their misconduct merely because those consequences are monetary, nor could such a holding be reconciled with our decision in G.J.B. & Assocs. We also see no reason to permit an immediate appeal under Cohen so that Mr. Smith can, without delay, attempt to somehow rehabilitate his reputation by persuading us to set aside the district court's decision. Mr. Smith's interest in promptly diminishing the stigma associated with the district court's decision is no greater than Mr. Dickstein's.

Finally, we see no basis for jurisdiction under 28 U.S.C. § 1292(a), because the challenged decision is not an injunction, or under the All Writs Statute, 28 U.S.C. § 1651, because Mr. Smith may secure adequate review through an appeal from the final judgment in the underlying case and because he has otherwise failed to make the showing required to obtain a remedy under that statute. See McNeil v. Guthrie, 945 F.2d 1163, 1165 (10th Cir. 1991)("In order to be entitled to mandamus relief, a petitioner must show a clear abuse of discretion or conduct which arbitrarily assumes and exercises authority contrary to that of the judiciary . . . Additionally, because mandamus is an extraordinary remedy, a petitioner must also show that he lacks an alternative for the relief he seeks and that his right to the writ is not in dispute"); Appeal of Licht & Semonoff, 796 F.2d 564, 573 (1st Cir. 1986)(writ of mandamus will not lie because sanction order may be reviewed on appeal from final judgment). Furthermore, the district court has not taken the steps necessary to invoke our

jurisdiction under 28 U.S.C. § 1292(b). Finally, even if we assume for the sake of discussion we would have jurisdiction if the district court had made an express finding there was "no just reason for delay" and directed entry of judgment against Mr. Smith pursuant to Fed. R. Civ. P. 54(b), which we consider to be a very great assumption indeed, the district court made no such express finding in this case.

Appeal DISMISSED. Petition for writ of mandamus or prohibition DENIED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LINDA C. HOWARD, Plaintiff-Appellant-Petitioner, v. MAIL-WELL ENVELOPE COMPANY, BUTLER PAPER COMPANY, GEORGIA-PACIFIC CORPORATION, GREAT NORTHERN NEKOOSA CORPORATION EMPLOYEE PROTECTION PLAN, Defendants-Appellees-Respondents, and, ZITA L. WEINSHIENK, United States District Judge, Respondent. ---------- DAVID L. SMITH, Attorney-Appellant-Petitioner.	No. 95-1428 (D.C. No. 93-D-1895) (Dist. of Colo.)

PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

Linda C. Howard and David L. Smith hereby file their Petition for Rehearing and Suggestion for Rehearing En Banc:

I. PETITION FOR REHEARING

On July 23, 1996, a three-judge disciplinary panel of the United States Court of Appeals for the Tenth Circuit (composed of Anderson, Brorby and Henry, Circuit Judges) ("Disciplinary Panel II") issued its (published) opinion (copy attached hereto) dismissing for lack of jurisdiction Ms. Howard's and Mr. Smith's appeal of immediately payable attorney fee sanctions of $8,640.00 imposed against Mr. Smith by United States District Judge Zita L. Weinshienk. These sanctions were imposed against Mr. Smith after another three-judge disciplinary panel of the Tenth Circuit (composed of Seymour, Chief Judge, Baldock and Brorby, Circuit Judges) ("Disciplinary Panel I") granted defendants-appellees' request for sanctions, imposed a sanction of double costs and attorney fees, and remanded this matter to Judge Weinshienk "to determine the amount of attorney fees on appeal to be awarded."

In its (July 23, 1996) opinion, Disciplinary Panel II held that the immediately payable attorney fee sanctions of $8,640.00 imposed against Mr. Smith by Judge Weinshienk were not immediately appealable under 28 U.S.C. §§ 1291, 1292(a), 1292(b), or 54(b), or under the collateral order doctrine of Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). However, Disciplinary Panel II overlooked the fact that when Disciplinary Panel I granted defendants-appellees' request for sanctions and imposed

a sanction of double costs and attorney fees, jurisdiction over this matter was thereby vested in the Tenth Circuit. See Braley v. Campbell, 832 F.2d 1504 (10th Cir. 1987); Stewart v. Donges, 915 F.2d 572 (10th Cir. 1990); Petuskey v. Rampton, 431 F.2d 378 (10th Cir. 1970), cert. denied, 401 U.S. 913, 91 S.Ct. 882, 27 L.Ed.2d 812 (1971). This jurisdiction was not divested when Disciplinary Panel I remanded this matter to Judge Weinshienk "to determine the amount of attorney fees on appeal to be awarded." Id. Under these circumstances, the Tenth Circuit retained jurisdiction over this matter, and Disciplinary Panel II erred by dismissing Ms. Howard's and Mr. Smith's appeal for lack of jurisdiction.

In its (July 23, 1996) opinion, Disciplinary Panel II also denied Ms. Howard's and Mr. Smith's petition for a writ of mandamus or prohibition, but failed to give its reasons (if any) for the denial. However, Ms. Howard and Mr. Smith had an indisputable right to a writ of mandamus or prohibition under the Tenth Circuit's holding in Burkett v. Chandler, 505 F.2d 217 (10th Cir. 1974), cert. denied, 423 U.S. 876, 96 S.Ct. 149, 46 L.Ed.2d 110 (1975). Therefore, in the absence of any reasons for denying Ms. Howard's and Mr. Smith's petition for a writ of mandamus or prohibition, Disciplinary Panel II deprived them of their First and Fifth Amendment right to access to the Tenth Circuit to review the actions of the district court pursuant to 28 U.S.C. § 1651 and Fed. R. Civ. P. 21.

III. SUGGESTION FOR REHEARING EN BANC

I express a belief based on a reasoned and studied professional judgment that the

panel decision is contrary to the following decisions of the Supreme Court or of the United States Court of Appeals for the Tenth Circuit, and consideration by the full court is necessary to secure and maintain uniformity of decisions in this court: Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed.2d 1528 (1949); Braley v. Campbell, 832 F.2d 1504 (10th Cir. 1987); Stewart v. Donges, 915 F.2d 572 (10th Cir. 1990); Petuskey v. Rampton, 431 F.2d 378 (10th Cir. 1970), cert. denied, 401 U.S. 913, 91 S.Ct. 882, 27 L.Ed.2d 812 (1971); Burkett v. Chandler, 505 F.2d 217 (10th Cir. 1974), cert. denied, 423 U.S. 876, 96 S.Ct. 149, 46 L.Ed.2d 110 (1975).

I express a belief based on a reasoned and studied professional judgment that this case involves one or more questions of exceptional importance: (1) Whether the immediately payable attorney fee sanctions of $8,640.00 imposed against Mr. Smith by Judge Weinshienk were immediately appealable under 28 U.S.C. §§ 1291, 1292(a), 1292(b), or 54(b), or under the collateral order doctrine of Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949); (2) Whether Disciplinary Panel II overlooked the fact that when Disciplinary Panel I granted defendants-appellees' request for sanctions and imposed a sanction of double costs and attorney fees, jurisdiction over this matter was thereby vested in the Tenth Circuit; (3) Whether this jurisdiction was divested when Disciplinary Panel I remanded this matter to Judge Weinshienk "to determine the amount of attorney fees on appeal to be awarded";

(4) Whether the Tenth Circuit retained jurisdiction over this matter, and Disciplinary Panel II erred by dismissing Ms. Howard's and Mr. Smith's appeal for lack of jurisdiction; (5) Whether Ms. Howard and Mr. Smith had an indisputable right to a writ of mandamus or prohibition under the Tenth Circuit's holding in Burkett v. Chandler, 505 F.2d 217 (10th Cir. 1974), cert. denied, 423 U.S. 876, 96 S.Ct. 149, 46 L.Ed.2d 110 (1975); (6) Whether in the absence of any reasons for denying Ms. Howard's and Mr. Smith's petition for a writ of mandamus or prohibition, Disciplinary Panel II deprived them of their First and Fifth Amendment right to access to the Tenth Circuit to review the actions of the district court pursuant to 28 U.S.C. § 1651 and Fed. R. Civ. P. 21.

Dated this 5th day of August, 1996.

Respectfully submitted,

LINDA C. HOWARD	DAVID L. SMITH
5273 Wheeling Street Denver, CO 80239 (303) 373-5666	1630 Welton Street Suite 300 Denver, CO 80202 (303) 534-0153
PLAINTIFF-APPELLANT-PETITIONER	ATTORNEY-APPELLANT-PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of August, 1996, true and correct copies of the foregoing Petition for Rehearing and Suggestion for Rehearing En Banc were placed in the United States mail, postage prepaid, addressed as follows:

Zita L. Weinshienk, United States
District Judge
United States Courthouse
1929 Stout Street
Denver, Colorado 80294

Jeffery T. Johnson, Esq.
Brian M. Mumaugh, Esq.
HOLLAND & HART
555 17th Street, Suite 2900
Denver, Colorado 80202

Randall A. Constantine, Esq.
Amy L. Lloyd, Esq.
ELROD & THOMPSON
1500 Peachtree Center - South Tower
225 Peachtree Street, N.E.
Atlanta, Georgia 30303

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LINDA C. HOWARD,	)	
	)	
Plaintiff-Appellant,	)	
	)	No. 95-1428
v.	)	
	)	
MAIL-WELL ENVELOPE COMPANY, BUTLER PAPER COMPANY, GEORGIA-PACIFIC CORPORATION, GREAT NORTHERN NEKOOSA CORPORATION EMPLOYEE PROTECTION PLAN,	)	
	)	
Defendants-Appellees,	)	
	)	
_____	)	
	)	
DAVID L. SMITH,	)	
	)	
Attorney-Appellant.	)	

ORDER
Entered August 29, 1996

Before ANDERSON, BRORBY, AND HENRY,
Circuit Judges

This matter comes on for consideration of attorney-appellant's petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court

PATRICK FISHER, Clerk

By: _____

Deputy Clerk